

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA**

State of Oklahoma, et al.,)	
)	
Plaintiffs,)	Civil No. 05-CV-0329 GKF-SAJ
)	
v.)	
)	
Tyson Foods, Inc., et al.,)	
)	
Defendants.)	
)	

**DEFENDANTS' RESPONSE TO PLAINTIFFS' "MOTION FOR LEAVE OF
COURT TO SUPPLEMENT EXPERT DATA"**

At 4:39 p.m. on the last business day before the hearing on their Motion for a Preliminary Injunction ("PI Motion"), Plaintiffs petitioned this Court for permission to change the data underlying their most complex expert opinion. *See Plaintiffs' "Motion For Leave Of Court To Supplement Expert Data"* (Dkt #1557). This is not the first time that Plaintiffs have changed Roger Olsen's work at the last second. Plaintiffs also revamped his data the day before his deposition. Plaintiffs' request to once again change the substance of Olsen's work (literally on the eve of trial) contradicts this Court's repeated rulings and severely prejudices the Defendants. The motion should be denied.

I. PLAINTIFFS' LAST-MINUTE CHANGE TO THEIR EXPERT CASE IS PART OF A PATTERN THAT PREJUDICES DEFENDANTS AND THIS COURT

At Plaintiffs' request, the Court established a very short schedule for Defendants to respond to Plaintiffs' PI Motion. Under that expedited schedule, Plaintiffs were

required to produce all documents which their experts considered 21 days in advance of each expert's deposition. *See* Exhibit 1 (decision of the Court). The Court set this deadline so Defendants would have at least a few weeks to analyze the experts' complex information before conducting each deposition.

For many of their experts, Plaintiffs did not comply with the Court's deadlines. In particular, Plaintiffs produced a huge new run of data for Roger Olsen the afternoon before his deposition was to occur. *See* Exhibit 2 (correspondence between counsel acknowledging the new Olsen data). As a result, Defendants were required to reschedule Olsen's deposition. *See id.*

Even after Olsen's deposition, Plaintiffs took the position that Olsen could continue to alter his data. *See id.* The Court rejected Plaintiffs' assertion that they could change the experts' work immediately before the hearing. In particular, the Court held that "[e]xpert testimony based on work performed and/or materials not disclosed until after the experts' deposition is excluded." Exhibit 1.

Despite that holding, Olsen has created a lengthy and complex new set of data and produced it this last Friday. *See* Exhibit 3 (a summary of Olsen's new data set). Plaintiffs ask permission to abandon Olsen's previous data and to substitute this new data in its place.

1. The Proposed Changes To Olsen's Data Are Substantial And Prejudicial

The nature of Olsen's opinion makes it particularly difficult to respond to any changes in his work. Olsen claims that he has identified a unique "chemical signature"

for poultry litter. *See* Exhibit. 4, Olsen Depo. 253:2-5. This alleged “signature” consists of what Olsen asserts is a “unique” combination of 24 different elements. In fact, none of these 24 elements are unique to poultry. These elements come from a number of sources in the Illinois River Watershed such as cattle, swine, point sources, septic tanks, commercial fertilizer and wildlife. However, Olsen claims that through a complicated multivariate statistical analysis (referred to as “principal component analysis” or “PCA”) he can identify inter-relationships in the concentrations of these 24 different elements that are unique to poultry litter.

This is voodoo science. Dr. Olsen admits that no scientist in the world has ever been able to do what he claims to have done. Ex. 4 at 119:24 – 122:2. However, because Olsen’s testimony is based on complex statistical analysis, it is difficult to analyze and explain his work. Defendants’ experts (including a qualified statistician) are now prepared to explain to the Court the bias, flaws, and statistical errors in Olsen’s data and opinion. *See* Huber Aff. ¶ 10; Sullivan Aff. ¶13. But Olsen wants to change the data underlying his opinions. As the Court can see by examining Exhibit 3, this new run of data contains thousands of values that must be analyzed to understand Olsen’s work. Clearly Defendants will be prejudiced if they must attempt to unpack this data and expose its errors over the weekend.

This is not a simple matter of dropping a few numbers from Olsen’s previous data. Because Olsen’s conclusions are based on the alleged inter-relationships in concentrations of 24 chemicals, every number in his data set is affected by the other numbers in his data. That is why Olsen has issued a completely new data run. *See*

Exhibit 3. Plaintiffs recognize that Olsen has made substantial changes to his data, and have therefore offered to allow Defendants to re-depose Olsen on Monday. *See id.* This is a hollow offer. Defendants' statistician says that he cannot even begin to analyze Olsen's new data run by Monday.

Plaintiffs attempt to minimize the burden by reassuring the Court that Olsen has not changed his ultimate *conclusion* that there is a unique chemical signature for poultry litter. *Id.* But this misunderstands the Court's role. The Court does not need to know that Olsen always comes to the same conclusion that Plaintiffs want despite multiple changes in his data set. The Court needs to know *why* he has come to that conclusion, and needs Defendants to have a full and fair opportunity to show the Court all of the mistakes and biases in Olsen's complex calculations.

II. PLAINTIFFS DO NOT MEET THE LEGAL STANDARD FOR OBTAINING THE RELIEF THEY REQUEST

Judges routinely set discovery deadlines in the context of preliminary injunction hearing. *See Autotech Technologies Ltd. Partnership v. Automationdirect.Com, Inc.*, 236 F.R.D. 396, 397 (N.D.Ill. 2006); *Township of West Orange v. Whitman*, 8 F.Supp.2d 408, 411 (D.N.J. 1998). Those deadlines must be respected to avoid prejudice to the parties and the Court. "Ignoring deadlines is the surest way to lose a case. Time limits coordinate and expedite a complex process; they pervade the legal system, starting with the statute of limitations. Extended disregard of time limits (even the non-jurisdictional kind) is ruinous." *U.S. v. Golden Elevator, Inc.*, 27 F.3d 301, 302 (7th Cir. 1994) (quoting *Northwestern National Insurance Co. v. Baltes*, 15 F.3d 660, 663 (7th Cir. 1994)). The

federal courts have repeatedly warned against “trial by ambush.” As the Sixth Circuit stated in *Val-Land Farms v. Third National Bank*, 937 F.2d 1110, 1113 (6th Cir. 1991), parties “are not free to present a moving target, thereby making the courts (both us and the district court) as well as their opponent guess at the nature of the claim presented to the court.”

In light of these rules, the federal courts have established a test for evaluating attempts to change a party’s expert case at the last minute. The party seeking to make a last-minute change in expert evidence bears the burden of showing that: (1) substantial justification exists for the Court to allow the changes; or (2) the changes are harmless to Defendants. *Okupaku v. American Airlines, Inc.*, 2007 WL 3511917 at *1-2 (S.D. Fla, Nov. 14, 2007); *Trustees of Painters Union Deposit Fund v. Interior/Exterior Specialist, Co.*, 2007 WL 4119020 at *1-3 (E.D. Mich., Nov. 16, 2007); *Avance v. Kerr-McGee Chemical LLC*, 2006 WL 3484246 at *1-7 (E.D. Tex. 2006) (rejecting last-minute changes to expert data underlying opinions); *Deshazo v. Estate of Clayton*, 2006 WL 1794735 at *12-13 (D.Idaho, June 28, 2006). This standard applies regardless of whether the deadline was set by the Court, by Rule 26, or whether the prejudice flows from a discovery failure. *See Trustees of Painters Union*, 2007 WL 4119020 at *1-3 (court-ordered deadline); *Avance*, 2006 WL 3484246 at *6-7; *Norbrook Labs. Ltd. v. G.C. Hanford Mfg. Co.*, 297 F.Supp.2d 463, 480-81 (N.D.N.Y. 2003).

Plaintiffs fail to meet either of these standards. There is no justification for Plaintiffs to change Olsen’s data on the last business day before trial. Plaintiffs note that Olsen just realized that he included unreliable data among the thousands of numeric

values in his tables. But the failure to uncover this error is Olsen's own fault.

Defendants served numerous discovery requests on Plaintiffs calling for production of Plaintiffs' scientific data. Moreover, In January 2007, Judge Joyner ordered Plaintiff to produce its scientific evidence to Defendants by no later than February 1. See Exhibit 5 at 8-11. But Plaintiffs did not produce Olsen's PCA work. In fact, Defendants have now uncovered an email exchange between Olsen and Plaintiffs' expert Valerie Harwood conspiring to conceal their data from discovery. See Exhibit 6. In that email exchange, Olsen and Harwood admit that their work is novel and non-standard in the scientific community, and they use that basis as a justification for withholding their data from Defendants. See Exhibit 6.

The whole point of expert discovery is to uncover errors and flaws in the expert's work. If Olsen had not conspired with Dr. Harwood to conceal their data from discovery, Olsen's various flaws (of which this is just one) could have been uncovered in the normal course rather than on the eve of trial.

The prejudice to Defendants is clear. The fact that Olsen has just realized that he included a set of unreliable data in his calculations shows how difficult it is to unpack his data. Plaintiffs cannot dump this new data run on Defendants and expect them to present it to the Court in a helpful way in a matter of days.

CONCLUSION

For the foregoing reasons, Plaintiffs' Motion for Leave to Supplement should be denied.

Respectfully submitted,

BY: /s/ Jay T. Jorgensen
Robert W. George, OBA #18562
Michael R. Bond
KUTAK ROCK LLP
The Three Sisters Building
214 West Dickson Street
Fayetteville, AR 72701-5221
Telephone: (479) 973-4200
Facsimile: (479) 973-0007

-and-

Thomas C. Green
Mark D. Hopson
Jay T. Jorgensen
Timothy K. Webster
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005-1401
Telephone: (202) 736-8000
Facsimile: (202) 736-8711

-and-

Stephen L. Jantzen, OBA # 16247
Patrick M. Ryan, OBA # 7864
Paula M. Buchwald, OBA # 20464
RYAN, WHALEY & COLDIRON, P.C.
119 N. Robinson
900 Robinson Renaissance
Oklahoma City, OK 73102
Telephone: (405) 239-6040
Facsimile: (405) 239-6766

**ATTORNEYS FOR TYSON FOODS, INC.;
TYSON POULTRY, INC.; TYSON
CHICKEN, INC; AND COBB-VANTRESS,
INC.**

BY: /s/ James M. Graves
(SIGNED BY FILING ATTORNEY WITH
PERMISSION)
James M. Graves
Gary V. Weeks

BASSETT LAW FIRM
P.O. Box 3618
Fayetteville, AR 72702-3618
Telephone: (479) 521-9996
Facsimile: (479) 521-9600

-and-

Randall E. Rose, OBA #7753
George W. Owens
OWENS LAW FIRM, P.C.
234 W. 13th Street
Tulsa, OK 74119
Telephone: (918) 587-0021
Facsimile: (918) 587-6111
**ATTORNEYS FOR GEORGE'S, INC. AND
GEORGE'S FARMS, INC.**

BY: /s/ A. Scott McDaniel

(SIGNED BY FILING ATTORNEY WITH
PERMISSION)

A. Scott McDaniel, OBA #16460
Nicole M. Longwell, OBA #18771
Philip D. Hixon, OBA #19121
MCDANIEL, HIXON, LONGWELL
& ACORD
320 South Boston Ave., Ste. 700
Tulsa, OK 74103
Telephone: (918) 382-9200
Facsimile: (918) 382-9282

-and-

Sherry P. Bartley
MITCHELL, WILLIAMS, SELIG,
GATES & WOODYARD, PLLC
425 W. Capitol Avenue, Suite 1800
Little Rock, AR 72201
Telephone: (501) 688-8800
Facsimile: (501) 688-8807
**ATTORNEYS FOR PETERSON
FARMS, INC.**

BY: /s/ R. Thomas Lay

(SIGNED BY FILING ATTORNEY WITH
PERMISSION)

R. Thomas Lay, OBA #5297

KERR, IRVINE, RHODES & ABLES
201 Robert S. Kerr Ave., Suite 600
Oklahoma City, OK 73102
Telephone: (405) 272-9221
Facsimile: (405) 236-3121

-and-

Jennifer s. Griffin
LATHROP & GAGE, L.C.
314 East High Street
Jefferson City, MO 65101
Telephone: (573) 893-4336
Facsimile: (573) 893-5398
**ATTORNEYS FOR WILLOW BROOK
FOODS, INC.**

BY: /s/ John R. Elrod
(SIGNED BY FILING ATTORNEY WITH
PERMISSION)

John R. Elrod
Vicki Bronson, OBA #20574
P. Joshua Wisley
CONNER & WINTERS, L.L.P.
211 East Dickson Street
Fayetteville, AR 72701
Telephone: (479) 582-5711
Facsimile: (479) 587-1426

-and-

Bruce W. Freeman
CONNER & WINTERS, L.L.P.
1 Williams Center, Room 4000
Tulsa, OK 74172
Telephone: (918) 586-5711
Facsimile: (918) 586-8547
**ATTORNEYS FOR SIMMONS FOODS,
INC.**

BY: /s/ Robert P. Redemann

(SIGNED BY FILING ATTORNEY WITH
PERMISSION)

Robert P. Redemann, OBA #7454
Lawrence W. Zeringue, OBA #9996
David C. Senger, OBA #18830
PERRINE, MCGIVERN, REDEMANN,
REID, BERRY & TAYLOR, P.L.L.C.
Post Office Box 1710
Tulsa, OK 74101-1710
Telephone: (918) 382-1400
Facsimile: (918) 382-1499

-and-

Robert E. Sanders
Stephen Williams
YOUNG WILLIAMS P.A.
Post Office Box 23059
Jackson, MS 39225-3059
Telephone: (601) 948-6100
Facsimile: (601) 355-6136
**ATTORNEYS FOR CAL-MAINE FARMS,
INC. AND CAL-MAINE FOODS, INC.**

BY: /s/ John H. Tucker

(SIGNED BY FILING ATTORNEY WITH
PERMISSION)

John H. Tucker, OBA #9110
Theresa Noble Hill, OBA #19119
RHODES, HIERONYMUS, JONES, TUCKER &
GABLE, PLLC
100 W. Fifth Street, Suite 400 (74103-4287)
P.O. Box 21100
Tulsa, Oklahoma 74121-1100
Telephone: 918/582-1173
Facsimile: 918/592-3390

-and-

Delmar R. Ehrich
Bruce Jones
Dara D. Mann

Krisann C. Kleibacker Lee
FAEGRE & BENSON LLP
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, Minnesota 55402
Telephone: 612/766-7000
Facsimile: 612/766-1600
**ATTORNEYS FOR CARGILL, INC. AND
CARGILL TURKEY PRODUCTION, LLC**

CERTIFICATE OF SERVICE

I certify that on the 12th day of February 2008, I electronically transmitted the foregoing document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

W. A. Drew Edmondson, Attorney General
Kelly Hunter Burch, Assistant Attorney General
J. Trevor Hammons, Assistant Attorney General
Tina L. Izadi, Assistant Attorney General
Daniel P. Lennington, Assistant Attorney General

drew_edmondson@oag.state.ok.us
kelly_burch@oag.state.ok.us
trevor_hammons@oag.state.ok.us
tina_izadi@oag.state.ok.us
daniel.lennington@oag.ok.gov

Douglas Allen Wilson
Melvin David Riggs
Richard T. Garren
Sharon K. Weaver
Robert Allen Nance
Dorothy Sharon Gentry
Joseph P. Lennart
RIGGS ABNEY NEAL TURPEN ORBISON & LEWIS

doug_wilson@riggsabney.com
driggs@riggsabney.com
rgarren@riggsabney.com
sweaver@riggsabney.com
rnance@riggsabney.com
sgentry@riggsabney.com
jlennart@riggsabney.com

J. Randall Miller
Louis W. Bullock
MILLER KEFFER BULLOCK PEDIGO LLC

rmiller@mkblaw.net
lbullock@bullock-blakemore.com

David P. Page
BELL LEGAL GROUP

dpage@edbelllaw.com

Frederick C. Baker
Lee M. Heath
William H. Narwold
Elizabeth C. Ward
Elizabeth Claire Xidis
Ingrid L. Moll
Jonathan D. Orent
Michael G. Rousseau
Fidelma L. Fitzpatrick
MOTLEY RICE, LLC

fbaker@motleyrice.com
lheath@motleyrice.com
bnarwold@motleyrice.com
lward@motleyrice.com
cxidis@motleyrice.com
imoll@motleyrice.com
jorent@motleyrice.com
mrrousseau@motleyrice.com
ffitzpatrick@motleyrice.com

COUNSEL FOR PLAINTIFFS

A. Scott McDaniel
Nicole Longwell
Philip D. Hixon
Craig A. Mirkes
MCDANIEL HIXON LONGWELL & ACORD, PLLC

smcdaniel@mhla-law.com
nlongwell@mhla-law.com
phixon@mhla-law.com
cmirkes@mhla-law.com

Sherry P. Bartley
MITCHELL, WILLIAMS, SELIG, GATES & WOODYARD, PLLC
COUNSEL FOR PETERSON FARMS, INC.

sbartley@mwsgw.com

R. Thomas Lay
KERR, IRVINE, RHODES & ABLES

rtl@kiralaw.com

David G. Brown
Jennifer S. Griffin
LATHROP & GAGE, L.C.
COUNSEL FOR WILLOW BROOK FOODS, INC.

dbrown@lathropgage.com
jgriffin@lathropgage.com

Robert P. Redemann
Lawrence W. Zeringue
David C. Senger
PERRINE, MCGIVERN, REDEMANN, REID, BERRY & TAYLOR, PLLC

rredemann@pmrlaw.net
lzingue@pmrlaw.net
dsenger@pmrlaw.net

Robert E. Sanders
E. Stephen Williams
YOUNG WILLIAMS P.A.
COUNSEL FOR CAL-MAINE FOODS, INC. AND CAL-MAINE FARMS, INC.

rsanders@youngwilliams.com
steve.williams@youngwilliams.com

George W. Owens
Randall E. Rose
THE OWENS LAW FIRM, P.C.

gwo@owenslawfirm.com
rer@owenslawfirm.com

James M. Graves
Gary V. Weeks
BASSETT LAW FIRM
COUNSEL FOR GEORGE'S INC. AND GEORGE'S FARMS, INC.

jgraves@bassettlawfirm.com
gweeks@bassettlawfirm.com

John R. Elrod
Vicki Bronson
Bruce W. Freeman
D. Richard Funk
P. Joshua Wisley
CONNER & WINTERS, PLLC
COUNSEL FOR SIMMONS FOODS, INC.

jelrod@cwlaw.com
vbronson@cwlaw.com
bfreeman@cwlaw.com
dfunk@cwlaw.com
jwisley@cwlaw.com

John H. Tucker
Colin H. Tucker
Theresa Noble Hill
Leslie J. Southerland
RHODES, HIERONYMUS, JONES, TUCKER & GABLE

jtucker@rhodesokla.com
chtucker@rhodesokla.com
thill@rhodesokla.com
ljsoutherland@rhodesokla.com

Terry W. West
THE WEST LAW FIRM

terry@thewestlawfirm.com

Delmar R. Ehrich
Bruce Jones
Krisann C. Kleibacker Lee
Dara D. Mann

dehrich@faegre.com
bjones@faegre.com
kklee@faegre.com
dmann@faegre.com

Todd P. Walker

twalker@faegre.com

FAEGRE & BENSON LLP

COUNSEL FOR CARGILL, INC. AND CARGILL TURKEY PRODUCTION, LLC

I also hereby certify that I served the foregoing document by United States Postal Service, proper postage paid, on the following who are not registered participants of the ECF System:

C. Miles Tolbert
Secretary of the Environment
State of Oklahoma
3800 North Classen
Oklahoma City, OK 73118
COUNSEL FOR PLAINTIFFS

Justin Allen
Office of the Attorney General (Little Rock)
323 Center St
Ste 200
Little Rock, AR 72201-2610

/s/ Jay T. Jorgensen

Jay T. Jorgensen